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No. 91-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK GREENBERG, Independent Executor of the Estate of John W. "Jack" McGann,

Petitioner,

— v.—

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, AND GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION AND BRIEF OF BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM AND GAY AND LESBIAN ADVOCATES AND DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER.

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H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, AND GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Bay Area Lawyers for Individual Freedom ("BALIF") and the Gay and Lesbian Advocates and Defenders ("GLAD"), by their attorney, move this Court to grant them leave to file a brief in support of the Petition for Grant of Writ of Certiorari, and in support of this motion, show as follows:

1. The Defendants H & H Music Company, Brook Mays Music Company, and General American Life Insurance Company have refused consent to the submission of this *amici curiae* brief.

2. Applicants' interest in the issues in, and the outcome of, this petition arises from their endeavors to ensure fair and equal treatment for People With AIDS in the areas of employment and health care, as more fully articulated in the Statement of Interest of *Amici Curiae*.

3. Applicants believe that a brief amici curiae, submitted by applicants, would be desirable in that the issues involved in this case concern not only the parties and applicants, but are also of considerable public interest and import, and it is therefore highly important that Petitioner's position be developed and presented fully.

Respectfully submitted,

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Steven Brostoff, AIDS-Related Life Insurance Claims Jumped in 1990, National Underwriter, Oct. 7, 1991, at 3. 31

E. Richard Brown, Access to Health Insurance, 46 Med. Care Rev. 368 (1989) 41,42

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Albert B. Crenshaw, Employers Try to Cut AIDS Costs: Firms Say Self-Insurance Spares Them

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Jesus Sanchez, Ill Feelings Over Self-Insurance, L.A. Times, June 9, 1991, at D1 41

Joan Vogel, Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?, 62 Notre Dame L. Rev. 1024 (1987) 44

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Bay Area Lawyers for Individual Freedom and Gay & Lesbian Advocates and Defenders share a common professional opinion--that insurance benefit caps are contrary to the law, damaging to the nation's health care system, seriously detrimental to the people with HIV infection who are subject to them, inherently discriminatory, and based on misconceptions regarding the relative cost of caring for people with HIV disease.

Bay Area Lawyers for Individual Freedom ("BALIF") is an organization of more than five hundred lawyers, legal workers and law students in the San Francisco Bay Area, founded in 1980 to protect and further t -egal and professional interests of lesbians and gay men and, more broadly, to seek justice for sexual

minorities under the law. BALIF has participated in the preparation and filing of a number of amicus curiae briefs in important state and federal gay and lesbian rights cases, including Bowers v. Hardwick, 478 U.S. 186 (1986); Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989), cert. denied, 111 S.Ct. 384 (1990); Westpac Audiotext, Inc. v. Wilks, 756 F. Supp. 1267 (N.D. Cal. 1991); and Johnetta J. v. Municipal Court, 218 Cal App. 3d 1255 (1990). In 1983, BALIF founded the AIDS Legal Referral Panel, the nation's largest provider of legal services to people with AIDS.

Gay and Lesbian Advocates and Defenders ("GLAD") is a public interest legal organization which does litigation and educational work

on lesbian and gay civil rights issues and, through its AIDS Law Project ("ALP") does similar work against HIV-related discrimination. A large part of the ALP caseload involves access to medical treatment and insurance-related matters, and ALP clients are adversely affected by caps on medical benefits for AIDS-related care.

Amici submit this brief so that this Court will have available for its deliberations an accurate statement of the position of AIDS advocacy organizations regarding the important issues presented by this appeal.

STATEMENT OF THE CASE

Amici rely on the Statement of the Case set out in Brief for Appellants.

SUMMARY OF THE ARGUMENT

Employers have discretion in the composition of their benefit packages under ERISA, even in whether to offer a benefit plan at all. Employers are, however, subject to the anti-discrimination policy embodied in §510, 29 U.S.C. §1140. In affirming the summary judgment order against Plaintiff-Appellant John McGann, the Fifth Circuit essentially eliminated a cause of action under §510 when the alleged discrimination involved the termination or amendment of welfare benefit plans. Such an interpretation of §510 renders the provision meaningless, as employers may accomplish through amendment or termination of a plan what they could not accomplish through termination of the employee--avoiding payment of medical expenses. Under the Fifth Circuit's interpretation of ERISA, employers may

offer employees illusory benefit packages by altering benefit plans whenever they do not wish to pay certain claims.

The Fifth Circuit has narrowed §510 to such an extent that it placed an unreasonably difficult burden on employees filing §510 claims. According to the Fifth Circuit, employers may effectively guarantee victory on a summary judgment motion in a §510 claim by putting forth a cost-saving defense, no matter how disingenuous. When an employer has drastically capped one illness, while retaining practically unlimited coverage for other illnesses of comparable cost, the employer is either misrepresenting the depth of its pocket or the veracity of its entire benefit plan. ERISA does not allow employers to deceive their employees in either manner, and therefore the Fifth Circuit erred in holding that summary

judgment for the Respondents was necessary as a matter of law.

An employee with promised health insurance coverage of $1 million would not anticipate the need to seek out further insurance. The employee relies upon the promised health insurance benefit and could not insure against the employer modifying benefits. The provisions of §510 are designed to protect against withdrawal of provided benefits.

Small employers are increasingly adopting self-insured plans, since decisions such as the Fifth Circuit's assure them that cutting and capping benefits are valid procedures. The protections of §510 must not be construed so narrowly as to encourage employers to take refuge from appropriate state insurance law under the umbrella of ERISA.

ARGUMENT

THE FIFTH CIRCUIT ADOPTED AN UNDULY NARROW INTERPRETATION OF ERISA §510, WHICH MUST BE READ TO PROHIBIT THE AMENDMENT OR TERMINATION OF WELFARE BENEFIT PLANS IN A MANNER WHICH WILL DEPRIVE AN INDIVIDUAL OR GROUP OF INDIVIDUALS FROM RECEIVING EXPECTED BENEFITS.

A. Section 510 of ERISA was implemented as a protection of employee rights and must be construed broadly to carry out this purpose. The Fifth Circuit adopted an unduly narrow interpretation of §510 which circumvents Congressional intent.

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1982). ERISA grew out of Congressional concern over abuses in the administration of welfare and pension plans, which directly affect "the continued well-being and

security of millions of employees and their dependents," but which, at the time, were lacking in "adequate safeguards concerning their operation." 29 U.S.C. §1001(a). ERISA was intended to prevent the deprivation of anticipated benefits, and provided "minimum standards . . . assuring the equitable character of such plans and their financial soundness." Id. (emphasis added). ERISA is remedial legislation, and as such, must be "liberally construed in favor of employee benefit fund participants." Kross v. Western Elec. Co., 701 F.2d 1238, 1242 (7th Cir. 1983). See also Vogel v. Independence Fed. Sav. Bank, 728 F. Supp. 1210, 1221 (D. Md. 1990).

ERISA was created primarily as a safeguard for pension plans, ensuring protections through vesting and funding requirements, fiduciary rules, reporting

and disclosure requirements, a termination insurance system, and enforcement and remedial measures. John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Plans 413 (1990). Welfare benefit plans, including health benefits, are covered by three parts of ERISA--the reporting and disclosure requirements, the fiduciary rules, and the enforcement and remedial measures. Id. The term "welfare benefit plan" encompasses

> any plan, fund or program . . established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death.

29 U.S.C. §1002(1). Both welfare benefit plans and pension plans are included in the term "employee benefit plan." 29 U.S.C. §1002(3). Though welfare benefit plans do not "vest" under ERISA, all

employee benefit plans, both welfare benefit plans and pension plans, are equally protected under the anti-discrimination provision of ERISA, §510, which reads as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. §1140. The import of this provision is clear; employers must not discriminate against an individual who attempts to claim the benefits that were promised to him or her under the employee benefit plan. The Fifth Circuit read this provision in an extremely narrow manner which distorts and diminishes the protections of §510.

When the Fifth Circuit affirmed summary judgment against John McGann it operated under several presumptions. First, it presumed that since the right to medical benefits does not vest under FRISA and the employer reserved the right to alter the plan, employees have no expectation interest in the benefits that are promised to them under employee welfare benefit plans, and that therefore these benefits can be removed at any time without the employer violating §510. McGann v. H & H Music Co., 946 F.2d 401, 405 (5th Cir. 1991). Secondly, the Court presumed that since any current or future employee who contracts AIDS will also be held to the five thousand dollar limit on medical expenses, H & H Music Company and General American Life Insurance were not taking action against McGann as an individual. McGann, 946 F.2d at 404. The

Court found reinforcement for the latter conclusion in the fact that McGann did not allege any specific intent on the part of H & H Music Company other than the intent to avoid paying his medical expenses. Id. These presumptions led to a result that is inequitable and blatantly contrary to the purpose of ERISA.

The Fifth Circuit viewed the lack of vesting as determinative. The court first found that McGann presented no evidence that "[t]he continued availability of the $1,000,000 limit was not a right to which McGann may have become entitled for the purposes of §510," since such a right must relate to "an existing, enforceable obligation." McGann, 946 F.2d at 405. The Court explained that "Congress viewed [section 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of

promised benefits." McGann, 946 F.2d at 405, citing Ingersoll Rand Co. v. McClendon, 498 U.S. ---, 111 S. Ct. 478 (1990) (emphasis in original). The Fifth Circuit then erroneously equated the concept of vesting to that of a promised benefit, holding that "McGann's allegations show no promised benefit, for there is nothing to indicate that defendants ever promised that the $1,000,000 coverage limit was permanent." Id.

Congress, unlike the Fifth Circuit, did not equate vesting with promised benefits. Kross, 701 F.2d at 1238. Welfare benefit plans are exempted from the vesting requirements of ERISA because of the nature of such plans as opposed to pension plans. Pension plan "[b]enefits accrue across decades of employment and are distributed across further decades of

retirement. Welfare benefit plans, by contrast, provide services or other benefits on a 'current account' or 'pay as you go' basis . . . [T]hese entitlements do not ordinarily cumulate over time." Langbein & Wolk, supra, at 413. The distinction is based solely on whether the benefit accumulates. Pensions grow over years of employment, as money is continually invested into the pension fund. In contrast, health coverage does not accumulate as the years go by, but is either used or declined at any given time. Id. This does not mean, however, that health benefits are not "promised" or "expected" benefits.

Other Circuits specifically reject the idea that employees are not entitled to anticipated benefits that have not vested. "Congress would not have adopted such broad and encompassing language" had

it intended such a narrow interpretation. Kross, 701 F.2d at 1242. Moreover, this Court has recognized that Congress, in enacting ERISA as a remedial statute for the benefit of employees, intended that "'appropriate equitable relief'" would grow around ERISA. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985). Such equity demands that the statute not be narrowed by illogical constructions.

At the time McGann notified his employer that he was ill and submitted his first reimbursement claims, H & H Music Company's health plan offered $1,000,000 worth of medical benefits for all illnesses, through a combination of self-insurance and its group medical plan issued by General American Life Insurance. McGann, 946 F.2d at 403. To the extent that the policy indicated a certain amount

of coverage, that amount was promised. An employee who believes he or she is covered to that extent would not foresee the near elimination of coverage for a specific disease; such an employee would be unlikely to purchase a supplemental health insurance policy. There is no secondary insurance market to which an employee could turn to purchase coverage in the event of limitation of his or her benefits by an employer. Thus, employees place great reliance on their work-related benefits, and employers must have a duty to treat their employees equitably in the administration of such benefits.

The Fifth Circuit also erred in concluding that since this change would effect "any other present or future plan beneficiary who might suffer from AIDS," McGann had failed to meet his burden of proving intent to violate §510. McGann,

546 F.2d at 404. Section 510 claims may be established either by an individual employee or "certain identified groups of employees." Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984), cert. denied 469 U.S. 1017 (1984). See also Kross at 1239 (class action brought under §510). Nothing in the plain language of the provision indicates that the action must affect only one person.

Furthermore, the Fifth Circuit actually noted in its opinion that "the defendants' knowledge of McGann's illness was a motivating factor in their decision to reduce coverage for AIDS-related expenses." McGann, 946 F.2d at 404, n. 4. Given that John McGann was the only employee of H & H Music Company who was known to have AIDS, it is illogical to conclude that this action wasn't taken

specifically to deprive him of coverage. Moreover, even if the change in benefit plans was solely motivated by a desire to save costs, the manner in which H & H Music Company amended the plan signalled discriminatory intent. For this reason alone, the Respondents were not entitled to a summary judgment ruling in their favor.

The plaintiff did not propose a complete ban on the amendment or termination of benefit plans. ERISA does acknowledge that employers may amend or terminate their plans, but §510 proscribes the amendment or termination of plans when such action is taken against specific individuals, affecting the benefits they would have otherwise received. See Vogel, 728 F. Supp. at 1225. H & H Music Company reserved the right to amend the benefit plan "at any time." The Fifth Circuit

believed that this reservation clause removed any expectation that McGann would have in his benefits. While such reservation clauses might be permissible within limits, employers must not be allowed to abuse them. The ability to terminate or amend "at any time" must not extend beyond the ability to amend or terminate given to employers under ERISA. Employers are limited by §510, and must act free of discrimination.

The full import of the Fifth Circuit's decision is best illustrated through several hypothetical scenarios. The pertinent question in each of these scenarios is whether employers should be allowed to amend or terminate health benefit plans. In the first scenario, an employee has incurred medical expenses and is awaiting reimbursement or payment from an employer-provided benefit plan. A

second scenario involves an employee who has notified the employer of an illness, but who has not yet incurred any medical expenses. The final scenario involves an employer who is unaware of any illnesses and who does not anticipate paying out benefits in the immediate future.

The Fifth Circuit's holding may be read to give an employer free rein to amend or terminate plans during any of these scenarios. That interpretation ignores the limitations imposed on employer discretion by §510. Giving employers such broad discretion, while reading §510's prohibitions so narrowly, renders §510 toothless.

Although ERISA gives employers the right to form their benefit plans freely, the statute does not give employers the right to offer illusory benefits. This is exactly the result to which the Fifth

Circuit's decision leads. The import of the Court's decision is that employers will be free to offer benefits to employees that will never be paid out. It is well-established that terminating an employee for the purpose of interfering with the attainment of welfare benefits is a violation of ERISA §510. See Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984) (employer violated §510 when it terminated employee after he contracted multiple sclerosis). Section 510 coverage is not limited, however, to dismissal of employees. Congress included the broad term "discriminate" in its list of prohibited activities. "Discriminate" should encompass any activity that would undermine the purpose of ERISA. See, e.g., Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 489 (2d Cir. 1988).

A more appropriate interpretation of §510 recognizes that an employer cannot amend an employee's benefits during either of the first two hypotheticals: that, as a rule, amending benefits is per se discrimination when a certain employee or group of employees will lose benefits that are currently necessary to ensure continued or imminent medical care. Alternatively, the statute might be interpreted as allowing employers to amend medical benefit plans during any of these three scenarios, as long as it is done in a reasonable manner. Cuts across the board, with illnesses of comparable cost capped at the same amount, and without any indication that the change was inspired by employees' illnesses would not violate §510. Retaining full coverage for most illnesses while drastically capping one disease signals discrimination. In this

case, the signal was as clear as a lighthouse beacon.

B. The Fifth Circuit Has Imposed an Insurmountable Burden On Plaintiffs in §510 Cases; The Allegation of Cost-Saving Motivation Should Be Sufficient as Prima Facie Proof of Discriminatory Intent.

The Fifth Circuit found McGann's allegation that his employer was trying to avoid paying for the costs of AIDS as insufficient evidence of discriminatory intent under §510, so that McGann could not survive the Respondents' motion for summary judgment. The Court was clearly in error on this point, since McGann had met the elements of a prima facie case of discrimination under §510, and in light of the evidence that the Respondents' cost-cutting excuse was pretextual.

In determining whether a plaintiff has established a §510 claim, courts apply

the standards for claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and the Age Discrimination in Employment Act, 29 U.S.C. §623 et seq. See Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988). A prima facie case of a §510 violation is made when the plaintiff demonstrates (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987). A plaintiff in a §510 claim meets his or her initial burden by establishing a prima facie case by a preponderance of the evidence; at that point, an employer has the burden of articulating a legitimate, nondiscriminatory reason for its actions, or of suggesting "that it would have

reached the same decision or engaged in the same conduct in any [event]." Gavalik, 812 F.2d at 853, 863; See also Dister, 859 F.2d at 1111, 1112. Such a showing rebuts the presumption of discrimination created by the plaintiff's prima facie case. Dister, 859 F.2d at 1112. A plaintiff then has the chance to "demonstrate that the employer's articulated reason is pretextual, 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Gavalik, 812 F.2d. at 853, quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256. (1981).

The United States District Court for the Southern District of Texas adopted the three prong test of Gavalik, but

misapplied the test in its grant of summary judgment. McGann, 742 F. Supp. 392, 394 (S.D. Tex. 1990). The court felt that "Plaintiff cannot prove that Defendants' conduct was prohibited. The Defendants had the right to change or terminate the medical plan under ERISA. In addition, the action was not taken to interfere with the rights of McCann [sic] but to ensure the future existence of the plan." Id.

The primary error on the part of the District Court was the determination that this conduct is never prohibited. By reading the first prong of the Gavalik test in this manner, the District Court would make it impossible to bring a claim under §510. It is circular to say that in order for conduct to be prohibited by §510, it must be conduct that is already prohibited. Courts should instead

interpret "prohibited conduct" to mean that employers may not "discharge, fine, suspend, expel, discipline or discriminate" against an employee. 29 U.S.C. §1140. All of the listed acts are permissible as long as they are not taken in violation of §510.

The Fifth Circuit compounded the error in affirming the District Court decision. The Fifth Circuit found that McGann did not establish a prima facie case of discrimination because, in their view, he had not articulated a question of fact to be decided at trial. McGann, 946 F.2d at 408. The Court essentially agreed with the District Court that amending or terminating medical benefits was not discriminatory action within the meaning of §510. Id. at 407-08. Yet the Cour indicated that if McGann had alleged that H & H Music Company and General American

Life Insurance were specifically trying to keep him from receiving benefits, he might have established a prima facie case sufficient to withstand Respondents' summary judgment motion. Id. at 404. Nonetheless, the Fifth Circuit refused to find McGann's version of the facts adequate for this purpose, and seemingly found irrelevant the fact that McGann's employer admitted its motivation to avoid payment of McGann's medical expenses.

Both the District Court and the Fifth Circuit erred in finding that this cost-saving rationale precluded a prima facie case of discrimination under §510. Under each of these decisions, no plaintiff will ever be able to establish a prima facie case of §510 violation when an employer had amended or terminated their welfare benefit plans and has plead a cost-saving rationale. As far as requiring an

employee to articulate specific discriminatory intent directed at him- or herself, rarely, if ever, will the employee be able to show that no other individuals will be affected in the future when the employer conduct is manifested through benefit caps. Secondly, the employer will necessarily be able to articulate a cost-saving rationale for its action in all benefit cap cases. Such a rationale must not be so heavily weighed as to completely preclude a full hearing on the issue of whether an employee was targeted as an individual.

The action taken by the employer in the case at bar was particularly egregious, and therefore should be looked upon with even greater suspicion, yet neither lower court gave McGann the opportunity to prove that the cost-saving argument was an illegitimate, pretextual

reason. The lower courts failed to substantially address the fact that the five thousand dollar cap on AIDS and AIDS-related illnesses was drastically low compared to the previous limit of $1,000,000, and compared to the coverage retained for other illnesses. When employers drastically reduce the coverage of one illness while retaining the original coverage of illnesses that are comparable in expense, the fallaciousness of their cost-cutting arguments becomes obvious.

Indeed, AIDS is not unusually expensive as compared to other serious illnesses. The average lifetime costs for a person with AIDS has recently been estimated at between $75,000[1] and $85,333[2].

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[1]Fred J. Hellinger, Updated Forecasts of the Costs of Medical Care for Persons with AIDS, 1989-1993, 105 Pub. Health Rep. 1 (1990) [hereinafter Hellinger 1989-1993 Forecasts].

[2]Fred J. Hellinger, Forecasting the Medical Care Costs of the HIV Epidemic, 1991-1994, 28

While increasing amounts of money are being spent on AIDS, this is due to an increase in people diagnosed with AIDS, not greater individual expense. See Christine Woolsey, Employers Ill-Prepared for AIDS, Bus. Ins., Oct. 7, 1991, at 1, 75. Furthermore, the amount of health insurance spent on AIDS as a percentage of the total health insurance claims in the nation remains stable. See Steven Brostoff, AIDS-Related Life Insurance Claims Jumped in 1990, National Underwriter, Oct. 7, 1991, at 3.

The costs of many common ailments and procedures equal or exceed those of AIDS and AIDS-related illness. The costs of liver transplants have been estimated from $145,000[3] to $235,000[4]. A kidney

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Inquiry 213 (1991) [hereinafter Hellinger 1991-1994 Forecasts]..

[3]Sarah Henry, AIDS and Insurance Costs, Washington Post, Nov. 12, 1991, at H16.

transplant is estimated to cost $51,000[5], while end-stage kidney disease might cost as must as $158,000[6]. A heart transplant can c up to $148,000[7] and the costs of acute myocardial infarction have been estimated from $51,211[8] to $66,800[9]. The average costs for a cancer patient in the last six months of life alone has been calculated as high as $29,249[10]. Yet none of these illnesses or procedures were capped under H & H Music Company's self-insured plan.

Christine Woolsey, How to Live with the Costs as Workers Live with AIDS, Bus. Ins. Oct. 7, 1991, at 87 [hereinafter Woolsey Costs].

[5]Id.

[6]Daniel M. Fox & Emily H. Thomas, AIDS Cost Analysis and Social Policy, 15 Law, Med. & Health Care 186 (1987-88).

[7]See Woolsey Costs, supra, at 87.

[8]Ellison H. Wittels, Joel W. Hay & Antonio M. Gotto, Medical Costs of Coronary Artery Disease in the United States, 65 Am. J. Cardiology 432 (1990).

[9]See Fox & Thomas, supra, at 186.

[10]Cancer Care and Cost 119 (Richard M. Scheffler & Neil C. Andrews eds. 1989).

Furthermore, H & H Music Company's action may be pretextual in a second sense. If H & H Music Company did not have enough resources to cover McGann's expenses, then surely it did not have enough to cover future catastrophic claims. If this is the case, then H & H Music Company would systematically deny its employees medical coverage when their bills became too high for H & H Music Company to cover. As each major catastrophic claim arose, either the individual with the illness would have to be singled out for benefit-reduction, or H & H Music Company would be forced to bankrupt itself. Employers must not be encouraged to offer their employees only illusory benefits.

In the face of such a discrepancy between coverage for other illnesses and coverage for AIDS, John McGann must be

found to have articulated a prima facie case of §510 violation. "The specific intent to violate ERISA §510 may, of course, be 'satisfied by the introduction of circumstantial evidence'. . ." Vogel, 728 F. Supp. at 1226 (holding that plaintiff did establish a prima facie case sufficient to withstand summary judgment), quoting Gavalik at 852. His allegation that H & H Music Company amended the benefit plan by capping AIDS benefits satisfied the first prong of the Gavalik test, because it was employer conduct that could be taken for a discriminatory purpose. McGann met the second prong of the Gavalik test when he alleged that H & H Music Company's action was taken to interfere with the attainment of his benefits, and he met the third prong of the test by alleging that he lost benefits to which he was entitled and to which he

may have become entitled. In sum, McGann had fully articulated a prima facie case of §510 violation, creating a presumption that the Respondents had discriminated against him within the meaning of ERISA. If this presumption went unrebutted by the Respondents, the District Court would have been obligated to enter judgment for McGann. See Gavalik at 852. Certainly, then, the District Court should not have given summary judgment to the Respondents.

Even if the lower courts felt that the cost-saving rationale rebutted the presumption of §510 violation, summary judgment should not have been entered for the Respondents. McGann retained the opportunity to show that H & H Music Company's rationale was mere pretext for discrimination, or even that the proffered rationale was an illegitimate basis on which to cap his benefits. An employer

who retains $1,000,000 coverage for the vast majority of illnesses cannot legitimately argue that it had capped one illness at $5,000 solely to save costs. Something spurred the employer to choose that certain illness. In this case, the catalyst was McGann's diagnosis of AIDS and his incurred expenses. The Respondents took action against McGann "for exercising [a] right to which he is entitled . . . [and] for the purpose of interfering with the attainment of any right to which [he] might become entitled." 29 U.S.C. §1140.

On a motion for summary judgment, the non-moving party is entitled to have all facts read in his or her favor. Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 233 (4th Cir. 1991). Yet each lower court failed to weigh the above facts in McGann's favor, regarding them in

a light more favorable to the Respondents. The Fifth Circuit's affirmance of the District Court decision substantially strays from the traditional standards of summary judgment.

The Fifth Circuit correctly noted that "McGann must make a showing sufficient to establish the existence of a genuine issue of material fact with respect to each material element on which he would carry the burden of proof at trial." McGann, 946 F.2d at 404. It has been shown that McGann met his burden of establishing a prima facie case. McGann also retained the ultimate burden of persuasion on the discrimination issue. Gavalik, 812 F.2d at 852. Yet he merely needed to prove the existence of an issue of fact on this point; the fact that he was effectively singled out among all of H & H Music Company employees was enough to

prove the existence of a material fact. Nonetheless, each lower court denied McGann the opportunity to prove this by inexplicably holding that, as a matter of law, McGann could not prevail at trial.

C. Small Employers Are Increasingly Turning To Self-Insured Plans As A Means Of Escaping State Mandates and Prohibitions on Insurance Caps; Public Policy Requires That This Practice Be Discouraged.

ERISA §514 provides that ERISA "shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan." 29 U.S.C. §1144(a). ERISA preemption is quite broad, covering all pension plans and most fringe benefits. Among the few exemptions from the preemption provision are "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. §1144(b)(2)(A). Employee benefit plans are specifically excluded from the definition of insurer

under ERISA, however, and so are not subject to state insurance laws. 29 U.S.C. §1144(b)(2)(B).

While Texas state law is not controlling in this case, it illustrates the types of law that employers avoid when they adopt self-insured plans. Texas state law prohibits discriminatory treatment on the part of insurers, particularly:

> [m]aking or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder.

Tex. Ins. Code Ann. art. 21.21(4)(7)(b) (emphasis added). Texas law also forbids insurers from discriminating on the basis of handicap in the following provision:

> An insurer who delivers or issues for delivery or renews any insurance in this state may not refuse to insure, refuse to continue to insure, limit the amount, extent, or kind of

> coverage available to an individual, or charge an individual a different rate for the same coverage solely because of handicap or partial handicap, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonable anticipated experience.

Tex. Ins. Code Ann. art. 21.21-3 (emphasis added). When these insurance laws are read in conjunction with Texas' Human Rights Act, Tex. Labor Code article 5221K et seq., which prohibits discrimination in the "terms, conditions, or privileges of employment" because of handicap, and the Texas Deceptive Trade Practices--Consumer Protection Act, Tex. Bus. & Com. Code art. 17.41 et seq., which mandates fair treatment of purchasers of insurance, the conclusion looms that H & H Music Company and General American Life Insurance would be prohibited under state law from reducing McGann's benefits as they did.

Employers are increasingly turning to self-insured plans in order to escape

the more rigorous requirements of state regulation. E. Richard Brown, Access to Health Insurance, 46 Med. Care Rev. 349, 368 (1989). Albert B. Crenshaw, Employer Try to Cut AILS Costs: Firms say Self-Insurance Spares Them From Paying Certain Benefits, Washington Post, January 6, 1991, at H11. Jesus Sanchez, Ill Feelings Over Self-Insurance, L. A. Times, June 9, 1991, at D1, col. 2. One recent study revealed that "more than half the companies that converted to self-insurance say they did so to avoid state mandates for certain types of coverage." Henry, supra, at H16.

There has been a "substantial growth in self-insurance since the early 1980's," especially among large employers, who are more likely to self-insure. Brown, supra, at 367. The numbers of small employers who are self-insuring is growing rapidly,

however, and it has been estimated that 26.7 percent of small employers (with fewer than 99 employees) now self-insure. Id. Problems arise primarily with these smaller employers, "who lack the deep pockets to cover medical claims," and the effects of these problems are too often felt by the employees. Id.

As more employers perceive ERISA as a means of escaping state law, states will find a steady decrease in the amount of regulatory control they have over the traditional state arena of the provision and administration of health benefits. It is paradoxical that a federal statute intended to provide consistency in the administration of benefit and pension plans has become a refuge for those employers who wish to avoid providing tangible catastrophic coverage for their employees. Congress certainly didn't

intend this reaction when they included welfare benefit plans under ERISA, and hence removed a large share of employee benefit plans from state regulation.

> ERISA §514 effectively federalizes the entire law of welfare benefit plans, except in those respects in which the insurance savings clause or other exceptions preserve state law . . . . As a result, federal courts have displaced state courts in areas in which state law was often adequate . . . . There is little reason to think that Congress understood how ERISA preemption would magnify the consequences of the decision to federalize the fiduciary standards for nonpension plans.

Langbein & Wolk, supra, at 414. Section 510, as a regulatory provision checking employer discretion, must be read broadly so as not to disrupt the purpose of ERISA.

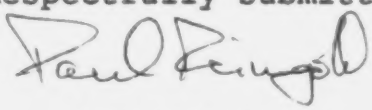
Furthermore, as far as it applies to health and disability benefits, ERISA should promote, rather than abrogate, the policies behind insurance law. "The purpose of insurance is to pool risks;

some will get sick or injured and others will not. If ERISA is to mean anything to employees and their families, it must prohibit employers from reducing insurance costs in ways that defeat this purpose." Joan Vogel, Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?, 62 Notre Dame L. Rev. 1024, 1030 (1987). Employers such as H & H Music Company should not be given the opportunity to eliminate all risks by eliminating real coverage for expensive diseases.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,



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